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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Draft declaration on the rights of indigenous peoples

Revised working paper submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes, pursuant to Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1991/30 and Commission on Human Rights resolution 1992/44

Introduction

1. In its resolution 1991/30 of 29 August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, prepare a further elaboration of the paragraphs of the draft universal declaration on the rights of indigenous peoples which were agreed upon by members of the Working Group at first reading, taking into account the relevant written observations received from Governments, indigenous peoples and intergovernmental and non-governmental organizations. The Commission on Human Rights, by its resolution 1992/44 of 3 March 1992, welcomed the decision of the Sub-Commission to continue to entrust the Chairperson-Rapporteur with the further development of a draft declaration, taking into consideration, inter alia, the comments of Governments, indigenous peoples' organizations and other interested parties.

2. The present working paper draws upon the written comments and observations received from Governments, indigenous peoples' organizations and other interested parties. The full texts of these comments are contained in the documentation prepared for the Working Group (E/CN.4/Sub.2/AC.4/1992/1, E/CN.4/Sub.2/AC.4/1992/2, E/CN.4/Sub.2/AC.4/1992/3 and their addenda). The

Chairperson-Rapporteur, keeping in mind the constructive discussions held at the ninth session of the Working Group, has also made some addditions and modifications in order to provide clarity.

3. As concerns the paragraphs not yet considered by the Working Group members in first reading (former paras. 18-30), the Chairperson-Rapporteur has made no modifications. The text is, thus, presented as revised by the Chairperson-Raoporteur pursuant to Sub-Commission resolution 1990/26. The suggestions contained in the revised working paper on the draft declaration available at the ninth session of the Working Group (E/CN.4/Sub.2/1991/36), together with other comments and suggestions submitted since the last session of the Working Group by representatives of indigenous peoples' organizations, Governments and certain specialized agencies, are included, for reference, in this document.

4. Section A of this document contains the preambular and operative paragraphs (paras. 1-18) as submitted by the members of the Working Group at first reading and subsequently revised by the Chairperson-Rapporteur; section B presents, on the left-hand page facing, the text of paragraphs of the draft declaration as revised by the Chairperson-Rapporteur for the ninth session of the Working Group and, on the right-hand page facing, a compilation of other suggestions and comments submitted after the ninth session of the Working Group.

5. It is the intention of the Chairperson-Rapporteur, in elaborating the final version of the draft declaration for consideration by the Working Group during its eleventh session, to include in the introducion an interpretation of certain concepts and terms used in the draft declaration (e.g., "peoples", "self-determination", "lands and territories", etc.). Reference will also be made to the working definitions of indigenous peoples used by the Working Group, including the definition proposed in paragraphs 34 and 45 of document E/CN.4/Sub.2/L.566 dated 29 June 1972 and the revised definition contained in paragraph 379 of document E/CN.4/Sub.2/1983/21/Add.8 as well as the comments made in chapter V of the Study of the Problem of Discrimination against Indigenous Populations prepared by the Special Rapporteur, Mr. José Martínez Cobo (United Nations publication, Sales No. E.86.XIV.3). The Chairperson-Rapporteur will also propose to the Working Group during its eleventh session some suggestions concerning the order and grouping of paragraphs as well as possible titles for the different parts of the draft declaration.

6. It is the hope of the Chairperson-Rapporteur that, during the tenth session of the Working Group, the first reading of the above-mentioned paragraphs can be completed, and a second reading of the draft declaration can be started. The expectation of the Chairperson-Rapporteur is that the second reading can be completed during the eleventh session of the Working Group in 1993, the International Year for the World's Indigenous People. Accordingly, she addresses an appeal to the members of the Working Group, representatives of indigenous peoples, Governments, specialized agencies, intergovernmental and non-governmental organizations and everyone concerned, to make every effort to contribute to the completion of the drafting of the declaration at the level of the Working Group during its eleventh session.

A. PREAMBULAR AND OPERATIVE PARAGRAPHS TO THE DRAFT DECLARATION AS SUBMITTED BY THE MEMBERS OF THE WORKING GROUP AT FIRST READING AND REVISED BY THE CHAIRPERSON-RAPPORTEUR PURSUANT TO SUB-COMMISSION RESOLUTION 1991/30

First preambular paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights to all peoples in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

Second preambular paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Third preambular paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

Fourth preambular paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of their lands, territories and resources, as well as in their poverty and marginalization,

Fifth preambular paragraph

Considering that treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility,

Sixth preambular paragraph

Welcoming the fact that indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

Seventh preambular paragraph

Recognizing the urgent need to respect and promote the rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which stem from their history, philosophy, cultures and spiritual and other traditions, as well as from their political, economic and social structures,

Eighth preambular paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse distinction or discrimination of any kind,

Ninth preambular paragraph

Endorsing efforts to revitalize and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources, as well as to promote their future development in accordance with their aspirations and needs,

Tenth preambular paragraph

Recognizing that the lands and territories of indigenous peoples should not be used for military purposes without their consent and reaffirming the importance of the demilitarization of their lands and territories which will contribute to peace, understanding, economic development and friendly relations among all peoples of the world,

Eleventh preambular paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children, and in particular to their right to equality of educational opportunities and access to all levels and forms of education,

Twelfth preambular paragraph

Recognizing in particular that it is usually in the best interest of indigenous children for their family and community to retain shared responsibility for their upbringing and education,

Thirteenth preambular paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens,

Fourteenth premabular paragraph

Noting that the International Covenants on Human Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Fifteenth preambular paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right of self-determination,

Sixteenth preambular paragraph

Encouraging States to comply with and effectively implement all international instruments as they apply to indigenous peoples, in consultation with the peoples concerned,

Seventeenth preambular paragraph

Solemnly proclaims the following Declaration on the Rights of Indigenous Peoples:

PART I

Operative paragraph 1

Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government;

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity;

PART II

Operative paragraph 4

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;

Operative paragraph 5

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person;

Operative paragraph 6

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification;

Operative paragraph 7

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

(a) Any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;

(b) Any form of forced assimilation or integration by imposition of other cultures or ways of life;

(c) Dispossession of their lands, territories or resources;

(d) Any propaganda directed against them;

Operative paragraph 8

Indigenous peoples have the right to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures, such as archeological and historical sites and structures, artefacts, designs, ceremonies, technology and works of art, as well as the right to the restitution of cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws;

Operative paragraph 9

Indigenous peoples have the right to manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains;

Operative paragraph 10

Indigenous peoples have the right to revive, use, develop, promote and transmit to future generations their own languages, writing systems and literature, and to designate and maintain their own names of communities, places and persons. States shall take effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other effective means;

Operative paragraph 11

Indigenous peoples have the right to all levels and forms of education, including access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes;

Operative paragraph 12

Indigenous peoples have the right to have the dignity and diversity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information. States shall take effective measures to eliminate prejudices and to foster tolerance, understanding and good relations;

Operative paragraph 13

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end;

Operative paragraph 14

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their own political, economic, social, cultural and spiritual development, and for the enjoyment of the rights contained in this Declaration;

PART III

Operative paragraph 15

Indigenous peoples have the right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used;

Operative paragraph 16

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. Nothing in the foregoing shall be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territories and resources;

Operative paragraph 17

Indigenous peoples have the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples

concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost;

Operative paragraph 18

Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance including international cooperation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories;

Operative paragraph 19

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, seeds, genetic resources, medicine and knowledge of the useful properties of fauna and flora.

B. PARAGRAPHS NOT YET CONSIDERED BY THE MEMBERS OF THE WORKING GROUP IN FIRST READING

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 20 (formerly draft operative paragraph 18)

PART IV

"The right tc maintain and develop within their areas of lands and other territories their traditional economic structures, institutions and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived;"

Suggested revisions

Draft operative paragraph 20

"The right to maintain, protect and further develop, within their traditional lands and other territories, their economic structures, institutions, and traditions. This right includes the right to be secure in the enjoyment of their traditional means of subsistence and ways of life. In no case may an indigenous people be deprived of their means of subsistence. It also includes the right to seek and obtain just, fair and mutually-agreed compensation, if they are so deprived;" (Informal Drafting Group I)

The words "socio-cultural and" to be added before the word "economic" in the second line of the draft operative paragraph revised by the Chairperson-Rapporteur (Government of Finland).

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 21 (formerly draft operative paragraph 19)

"The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities;"

Suggested revisions

Draft operative paragraph 21

"[The right to seek and obtain from non-indigenous authorities the fulfilment of their responsibilities or obligations related to the effective and continuing improvement of the economic and social conditions of, as well as the quality of life for, indigenous peoples, with their free, genuine consent and according to their own priorities;]" (Informal Drafting Group I)

Suggested revisions

Draft operative paragraph 21 (bis) (new)

"The right to humanitarian assistance from States and national and international organizations. The latter shall ensure, in conjunction with the peoples concerned, that their assistance accrues to indigenous peoples' direct and full benefit;" (Informal Drafting Group I)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 22 (formerly draft operative paragraph 20)

"The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions;"

Suggested revisions

Draft operative paragraph 22

"The right to determine, plan and implement, in the context of their right of self-determination, all health, housing, and other social, cultural and economic measures affecting them, and execute such measures through their own institutions;" (Informal Drafting Group I)

Draft operative paragraph 22 (bis) (new)

"The right to their own traditional medicines and health practices. This includes the right to protection of vital medicinal plants, animals, and minerals. The above may not be construed as a limitation to indigenous peoples' right of access to services provided by the non-indigenous health systems, if they so wish;" (Informal Drafting Group I)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 23 (formerly draft operative paragraph 21)

PART V

"The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, including in particular proper regard to and recognition of indigenous laws and customs;"

Suggested revisions

Draft operative paragraph 23

"The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic and social life of the State and to have their specific character duly reflected in the political system and in socio-economic institutions, including in particular proper regard to and recognition of indigenous customs;" (Argentina)

It would perhaps be desirable to replace the word "adverse" by "unfavourable" and to insert the words "and cultural" after "social", the words "and laws and customs" after "specific character" and the words "and cultural" after "socio-economic" and to delete the words "including in particular proper regard to and recognition of indigenous laws and customs". (UNESCO)

"(a) The right to have their distinct political, social, cultural and economic characteristics duly reflected in the institutions of the government under which they live.

(b) The right to full recognition and proper regard to indigenous laws, customs and practices in the legal systems and political institutions of the State.

(c) The right of members of indigenous peoples to participate fully and without adverse discrimination in the political, economic and social life of the State. The exercise of this right shall in no way adversely affect the collective rights of the peoples concerned;" (Informal Drafting Group II)

The word "adverse" should be deleted from the second line of part (c) in the text proposed by Informal Drafting Group II. (Working Group member)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 24 (formerly draft operative paragraph 22)

"The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, life and destiny, including the right of indigenous peoples to be involved, through appropriate procedures, determined in conjunction with them, in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures. States have the duty to guarantee the full exercise of these rights;"

Suggested revisions

Draft operative paragraph 24

"(a) The right to participate effectively at the State and international levels, through representatives freely selected by themselves and by means of their own choosing, in policy and decision-making and in implementation in all matters which they consider may affect their rights, lives, and futures." (Informal Drafting Group II)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 25 (formerly draft operative paragraph 23)

"The collective right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic and management activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions;"

Suggested revisions

Draft operative paragraph 25

"(a) The right to determine, without interference, all matters pertaining to their own affairs, including, inter alia, control over lands and resources, social and political relations, dispute resolution, criminal jurisdiction, environmental protection and managements, economic activities, education, culture, traditional religious practices, health, taxation and entry by non-members.

(b) The right of indigenous peoples concerned to determine the nature and structures of their institutions and to select the membership of such institutions according to their own procedures. The duty of States, where the peoples concerned so desire, to recognize such institutions and their membership through the legal systems and political institutions of the State;" (Informal Drafting Group II)

The last sentence of part (b) should be reworded to read "States have the duty ..." in harmony with paragraph 22 (b) as suggested by Informal Drafting Group II. (Working Group member)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 26 (formerly draft operative paragraph 24)

"The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous people concerned for these purposes; States have the duty, where the peoples concerned so desire, to recognize such institutions and their memberships through the legal systems and political institutions of the State;"

Suggested revisions

Draft operative paragraph 26

The words "the right to determine their own citizenship without external interference" should be added. (Indigenous representative)

"The right to determine their own membership. The duty of States to accept that determination;" (Informal Drafting Group II)

"The right to determine their own identification as a member of a particular indigenous people. Such determination should be accepted by the State concerned;" (Working Group member)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 27 (formerly draft operative paragraph 25)

"The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms;"

Suggested revisions

Draft operative paragraph 27

"The right to determine the social consequences of the responsibilities of individuals to their own community, consistent with the laws and with universally recognized human rights and fundamental freedoms;" (Argentina)

"The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms;" (Informal Drafting Group II)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 28 (formerly draft operative paragraph 26)

"The right to maintain and develop traditional contacts, relations and cooperation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts;"

Suggested revisions

Draft operative paragraph 28

"The right to maintain and develop traditional contacts and cooperation, including cultural and social exchanges with their own kith and kin. Also the right to trade with them across State boundaries, in the same conditions that apply for all the members of the national community in its entirety and subject to the customs regulations in force for all in the country concerned and the obligation of the State to adopt measures to facilitate such contacts;" (Argentina)

"It would be more logical to replace the words 'with their own kith and kin' by 'with members of their people and with other indigenous peoples'," (UNESCO)

"The right of indigenous peoples divided by international borders to maintain and develop relations and commerce including unrestricted travel for cultural, social, sporting, religious and traditional economic purposes, across State borders. The duty of States to adopt measures, in conjunction with indigenous peoples, to facilitate the exercise of this right;" (Informal Drafting Group II)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 29 (formerly draft operative paragraph 27)

"The right to claim that States honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies;"

Suggested revisions

Draft operative paragraph 29

Article 29 should be deleted. (Argentina)

"It would perhaps be necessary to add at the end of this article the words 'and to submit any disputes that may arise in this matter to impartial national or international bodies'," (UNESCO)

"The right to have claims pertaining to treaties between indigenous peoples and States heard before an impartial international tribunal;" (Indigenous representative)

"The right to the observance and enforcement of treaties and other agreements concluded with indigenous peoples;" (Indigenous representative)

"The duty of States to honour and to implement treaties and other agreements concluded with indigenous peoples according to their original intent, pursuant to the principle of pacta sunt servanda;" (Informal Drafting Group II)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 30 (formerly draft operative paragraph 28)

PART VI

"The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms;"

Suggested revision

Draft operative paragraph 30 (bis) (new)

"States have a duty, in conjunction with the indigenous peoples concerned, to take prompt and effective measures to ensure the full enjoyment of the exercise of the indigenous rights and other human rights and fundamental freedoms referred to in this Declaration." (Informal Drafting Group III)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 31 (formerly draft operative paragraph 29)

PART VII

"These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world;"

Suggested revisions

Draft operative paragraph 31

"These rights may in no event justify segregationist policies or be exercised in disregard of the principles stated in the Charter of the United Nations and the international instruments of human rights;" (UNESCO)

Draft operative paragraph 31 (new)

"The application of the provisions of this convention shall not adversely affect the rights and benefits guaranteed to the peoples concerned pursuant to other conventions and recommendations, international instruments, treaties or national laws, decisions, customs or agreements;" (UNESCO)

Revised text proposed by the Chairperson/Rapporteur

Draft operative paragraph 32 (formerly draft operative paragraph 30)

"Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein;"

Paragraphs suggested by the Chairperson/Rapporteur for consideration for inclusion without prejudice for their placement

"Indigenous peoples have the right to special protection in periods of armed conflict. States shall observe international standards for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous people against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Force indigenous people to abandon their land and territories and means of subsistence and relocate them in special centres for military purposes."

"Indigenous peoples have the right to retain and develop their customary laws and legal systems where these are not incompatible with fundamental rights defined by international human rights standards."

"Indigenous peoples shall not be forcibly removed from their lands or territories. Where relocation occurs it shall be with the free and informed consent of the indigenous peoples concerned and after agreement on a fair and just compensation and, where possible, the option of return."